**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 08 September 2003**

**BALCA Case No.: 2002-INA-276**
ETA Case No.: P2000-CA-09497199

*In the Matter of:*

**SUMMIT HOUSE RESTAURANT CO.,**
*Employer,*

*on behalf of*

**RIGOBERTO PEREZ-PEREZ,**
*Alien.*

Appearance: Leonard W. Stitz, Esquire
Santa Ana, California
For Employer/Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

## DECISION AND ORDER

**PER CURIAM**. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Cook."[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

§656.26.

## STATEMENT OF THE CASE

On January 16, 1998, Summit House Restaurant Co. ("Employer") filed an application for labor certification to enable Rigoberto Perez-Perez ("Alien") to fill the position of Cook. (AF32). The position required two years of experience in the job offered.

The CO issued a Notice of Findings ("NOF") on December 10, 2001, proposing to deny certification.[2] (AF 28). The CO determined that the Alien had worked forty hours per week for two different employers at the same time, as he was listed as working from August of 1991 to November of 1997 for the instant Employer as well as for Five Crown Restaurant. Employer was directed to provide the Alien's work schedule during the time period, and to show his schedule for each restaurant and the hours of operation of each restaurant. If necessary, Employer was to submit an amendment, signed by the Alien, showing the number of hours worked per week at each restaurant.

Counsel for Employer submitted a letter dated January 11, 2002, stating that the information requested had not been obtained, and requesting an extension of time. (AF 25). The CO gave Employer until February 18, 2002. (AF 24).

On March 26, 2002, the CO issued a Supplemental NOF,[3] clarifying that 20 C.F.R. §656.21(b)(5) requires that the job requirements as described represent Employer's actual minimum requirements. (AF 21). Employer's requirement of two years experience as a cook did not appear to meet Employer's true minimum requirements, since it was unclear whether the Alien actually

[2]The issue which was successfully rebutted will not be detailed herein.

[3]The record does not contain Employer's rebuttal of February 15, 2002. Given that a supplemental NOF was issued, wherein the CO pointed out that the rebuttal indicated only that the Alien had worked for Five Crowns Restaurant, and which Supplemental NOF provided Employer additional rebuttal time, the fact that Employer's initial rebuttal is not in the record does not alter the outcome of this case.

worked the equivalent of two full years as a cook for Five Crowns Restaurant prior to his employ with Employer. Employer, therefore, needed to amend the experience requirement and retest the labor market or document that the Alien obtained the required experience or training elsewhere. Employer was advised that it would not be sufficient to state that the Alien gained his qualifying experience at Five Crowns Restaurant. Documentation needed to show the work schedule for each job listed in Item 15b of the ETA750B, and the dates, name and location of the employers and the duties performed.

Employer and its counsel submitted a Response to Supplemental NOF on April 25, 2002. (AF 16). Therein, Employer stated its intent to amend the ETA 750B to reflect that the Alien worked at Five Crowns Restaurant full-time for one month in April of 1991, and then from 1995 thorough 1997 from 4:00 p.m. to 11:00 p.m., having also worked for Employer from August 1991 to present, with a schedule of 7:00 a..m. to 3:00 p.m. The statement was signed by Employer, the Alien and counsel.

A second Supplemental NOF was issued on May 13, 2002. (AF 13). The CO determined, based on the documentation submitted by Employer, that the Alien only had one month of experience prior to commencing work for Employer as a cook, and not the two years of experience Employer was requesting. Employer was advised it could amend the experience requirement and retest the labor market. If Employer intended to retain the requirement it needed to (1) provide convincing justification that due to a change in circumstances, it was not now feasible to hire anyone with less than the two years of experience; or (2) document that the occupation in which the Alien was hired was dissimilar from the occupation for which Employer was seeking labor certification. Employer could also rebut by establishing that the Alien obtained the required work experience before being hired by Employer in 1991.

Employer submitted rebuttal on June 3, 2002. (AF 7). Therein, Employer argued that the Alien had "well in excess of two years experience at the time of the filing of the ETA 750." Specifically, Employer argued that when the ETA 750 was filed in 1998, the Alien had worked for Five Crowns Restaurant for two years and with the instant Employer for seven years, prior to the

petition being filed. According to Employer, federal law did not require that the Alien have the required work experience or training before being hired by Employer in 1991, only that the Alien have the required experience or training before the filing of the petition.

The CO issued a Final Determination ("FD") on June 28, 2002, denying certification. (AF 5). Therein, the CO reiterated that the Alien only had one month of experience prior to his hire by Employer. While Employer argued that the Alien had two years of experience with Five Crowns Restaurant at the time of the filing of the petition, plus another seven years of experience with Employer, Employer did not claim that the job for which the Alien was hired in 1991 was any different from the job now being offered. Nor did Employer claim that there had been a change in circumstances, and thus could not hire an employee with less than two years of experience. Employer refused to amend the experience requirement and it failed to show that the two year experience requirement was its actual minimum requirement. As Employer remained in violation of 20 C.F.R.§ 656.21(b)(5), the application was denied.

By letter dated July 9, 2002, Employer requested a review of the denial of labor certification by the Board of Alien Labor Certification ("BALCA" or "Board"). (AF 1).

## DISCUSSION

Employer's counsel has submitted a Statement of Position wherein he reiterates the argument that the Alien had the requisite two years of experience prior to the filing of the petition. Employer contends that it is contrary to federal law to require that the Alien have gained the required experience before being hired by Employer in 1991.

Section 656.21(b)(5) requires an employer to document that its requirements for the job opportunity represent the employer's actual minimum requirements for that job, and that employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience. In the instant

case, Employer hired the Alien for the position at issue with less than two years of experience. It is now requiring U.S. applicants to have two years of experience prior to hire for that same position.

An employer must document either (1) that the requirements it specifies for the job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience; or (2) that it is not feasible to hire workers with less training or experience. Employer herein does not submit any argument relative to the latter. With regard to the former, Employer concedes that the Alien had less than the actual minimum requirements at the time of hire, arguing that it is the experience that the Alien had at the time of the filing of the petition which should be considered.

An employer violates section 656.21(b)(5) if it hires an alien with lower qualifications than it is now requiring and has not documented that it is not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Employer has done just that. Labor certification was properly denied, and the following Order shall issue.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.